Supreme Court, U.S.
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No. 95-137

IN THE

Supreme Court of the United States

October Term, 1995

CHARLES L. WILLIAMS, *ET AL.*,

Petitioners,

v.

NATIONAL BASKETBALL ASSOCIATION, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The NBA Teams' brief is noteworthy as much for what it omits as for what it contains. The Petition showed each of the Second Circuit's three foundation assumptions was (i) unsupported, and (ii) wrong (Pet. 6-19). Revealingly, the Teams do not defend any of the assumptions, and ignore, as had the Circuit, both the language and purpose of the statutes and this Court's jurisprudence.

1. In an ipse dixit, the Circuit said there has long been a "general understanding" that the Sherman Act permits employer collusion to fix wages and terms of employment. But the Act's language, this Court's decisions in *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926), and *Industrial Ass'n v. United States*, 268 U.S. 64 (1925), and the logic of the many decisions involving conspiracies by unions all belie this ipse dixit. The Teams choose not to defend the Circuit's self-described "important" first premise.

2. The Circuit next assumed that even if the Sherman Act bars employer collusion in the labor market, the Wagner Act repealed that part of the Sherman Act. But neither the Circuit nor the Teams have ever pointed to any supporting language in the Wagner Act. Nor has there ever been a response to this Court's "repeated" rulings that "repeals by implication are not favored" and "there is a heavy presumption against implicit exceptions" to the Sherman Act. *See* Pet. 12-16. Finally, neither the Circuit nor the Teams has ever explained why a statute meant to enhance employees' rights to unionize should be read to take away antitrust rights from unionized employees unless and until they disband their union.

3. Finally, the Circuit assumed it was free to define the scope of the "nonstatutory" labor exemption as broadly as its policy predilections suggested, without mentioning *any* of this Court's decisions creating and defining the exemption. Once again, the Teams ignore our showing (Pet. 14-19) about the origins, purpose and content of the exemption.

The cases the Teams do cite support none of the Circuit's three foundation assumptions and are readily distinguished below. In defending the Circuit's radical conclusion—that the price of unionization is loss of *all* antitrust rights—the Teams resort to a policy polemic. We showed (Pet. 21-26) that the Circuit's radical result makes for bad antitrust and bad labor policy. In this, the Justice Department, the NLRB's Chair, and the commentators join (Pet. 21-26). But the key point is that the statutes, and cases interpreting them, should control, not unanchored judicial policy preferences. As history reveals, it is both unprincipled and harmful for judges to attempt to legislate their preferences—whether wise or foolish—into law.

I. THE DECISION BELOW IS BASED ON UTTER DISREGARD OF THIS COURT'S PRECEDENTS AND AN ERSATZ REWRITING OF HISTORY.

A. *The Sherman Act Applies To The Labor Market.*

The Teams repeatedly say the Sherman Act does not reach anticompetitive conduct in the labor market. *See* Opp. 4, 8, 18. Their position, like the Circuit's, relies on a gross misunderstanding of the relevant law. Incredibly, the Teams utterly ignore this Court's decisions applying the Sherman Act to labor market restraints, fail to discuss any of this Court's cases concerning the nonstatutory exemption, pretend the Wagner Act has no legislative history, and instead glancingly cite a few inapposite cases.[1]

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[1] *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 539-41, 545-46 (1983), suggests a union *per se* may not have *antitrust standing* to assert Sherman Act rights of its membership—which presumably explains why the Teams started this case by suing a group of named players, not the union. *Mid-America Regional Bargaining Ass'n, Inc. v. Will County Carpenters Dist. Council*, 675 F.2d 881 (7th Cir.), *cert. denied*, 459 U.S. 860 (1982), is dictum, but in any case supports petitioners' view that the nonstatutory labor exemption depends upon labor-management agreement. *See* Opp. 20.

In the forty years following the Sherman Act's adoption, one of its most vigorous—and politically controversial—applications was against concerted actions by union members in boycotts, picketing, and even the simple act of organization. As the most famous of countless other examples, in the "Danbury Hatters" case, *Loewe v. Lawlor*, 208 U.S. 274, 309-10 (1908), this Court applied the Sherman Act to direct restraints in the labor market because "[t]he act made no distinction between classes" and "[t]he records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed."

Because of labor's torrential outcry against the Sherman Act, Congress passed the Clayton Act, which, unlike several other competing measures, *see generally*, Felix Frankfurter & Nathan Greene, *The Labor Injunction*, 155-58 (1930), did not exempt all labor disputes from the Sherman Act, but instead, in the words of President Wilson, did not "do more than exclude the possibility of labor and similar organizations being dissolved as in themselves combinations in restraint of trade." 5 Philip Foner, *The History of the Labor Movement in the United States*, 134 (1980) (quoting letter from President Wilson to Charles R. Van Hise, July 13, 1914). Even after the Clayton Act, however, the Sherman Act continued to be applied to union activities directed solely at the labor market. *See, e.g.*, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927). It is thus simply incredible to contend the Sherman Act was not intended to apply to labor markets.

The Teams also ignore this Court's decisions in *Industrial Ass'n* and *Anderson*, which demolish the thesis that the Sherman Act does not apply to labor market restraints. *See* Pet. 8-11. Likewise, in *United Mine Workers v. Pennington*, 381 U.S. 657, 664-65 (1965), this Court refused to exempt

from the Sherman Act restraints operating directly on the labor market—including provisions fixing hours and wages—even though those restraints had been agreed to by a union and multiemployer group. Indeed, given our extensive discussion of this Court's decisions applying the Sherman Act to labor market restraints, *see* Pet. 6-11, it is astonishing the Teams do not discuss *any* of those decisions.[2]

B. *The Wagner Act Does Not Repeal The Sherman Act.*

Starting from the proposition that the Sherman Act *does* reach restraints in labor markets, the Teams must explain where, how and why Congress curtailed that application. The Teams do not dispute this Court's repeated pronouncements that implicit statutory repeals are disfavored and that there is a heavy presumption against all implicit exceptions—including the "limited" nonstatutory exemption to the Sherman Act. *See* Pet. 16. Against that heavy burden, the Teams offer the notion that "the Sherman Act must yield to the later-enacted NLRA". Opp. 6. The Teams' trite solution depends upon their refusal to consider this Court's cases defining the nonstatutory exemption. In those cases, this Court wrestled with the balance to be struck between the labor and antitrust laws, paying attention to the purposes behind both, and allowing an exemption only when absolutely necessary. Notably, those cases focus on whether an *agreement* between a union and employer should be exempted from the antitrust

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[2] The Teams disregard cases such as *Radovich v. NFL*, 352 U.S. 445 (1957) (applying Sherman Act to group boycott claim brought by player against football teams); *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (the antitrust laws outlaw restraints of trade "which unreasonably forbid[] any one to practice his calling") (L. Hand, J.); *accord Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) ("our cases have specifically included the sale of services within § 1") (citing *Radovich*)—cases that undeniably establish the reach of the Sherman Act to restraints of trade affecting the labor market alone.

laws; only once *(Jewel Tea)* did the Court actually exempt the agreement. *See* Pet. 16-19.

The Teams silently concede that nothing in the text of the Wagner Act purports to curtail the Sherman Act. The Teams also ignore the legislative history of the Wagner Act, which conclusively repudiates the Circuit's holding that Congress's enactment of the labor laws stripped unionized workers of their Sherman Act rights.[3] Against that history, the Circuit's position is simply unfathomable: Congress surely did not intend to repeal or curtail the application of the Sherman Act when it adopted the Wagner Act.

C. *The Caselaw Concerning Multiemployer Bargaining Does Not Erode The Sherman Act.*

The Teams devote considerable time to cases concerning collective bargaining and multiemployer bargaining. *See* Opp. 8-21. However, none of those cases, including the cases decided by this Court, involved antitrust claims: they were decided purely under the labor laws, in situations where no balancing between labor and antitrust policy was required.

For example, the Teams rely on *NLRB v. Katz*, 369 U.S. 736 (1962), and *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991), for the proposition that after a collective

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[3] Senator Wagner explained that Congress had "designed" the Sherman Act "to protect the laborer . . . from the power of combination and greed of monopoly", that "the heavy hand of the courts paralyzed the enforcement of the antitrust laws", and that the "most glaring paradox" of the "history of our times . . . [is] the manner in which the anti-trust laws were swerved from the course marked out by Congress and were invoked to harass the activities of those very groups they had been designed to protect". 79 CONG. REC. 7565-66 (1935). He complained of the "judicial hostility to labor organizations" evidenced by the persistent Sherman Act attacks on labor organizations, *id.*, and inveighed against the substitution of "economic opinions of the Court for the expressed policy of Congress", *id.*, which had "intensified" the "weakness of the isolated wage earner". S. Rep. No. 573, 74th CONG., 1st SESS. 3 (1935).

bargaining agreement expires and before impasse, employers must maintain the status quo. That duty is not contained in any statute; it was implied, first by the NLRB and then by this Court, from the statutory duty to bargain in good faith. Of course, *Katz* and *Litton* make no attempt to balance the implied obligation against the Sherman Act's explicit language, because those cases involved a single employer, and no antitrust claim was raised.[4] Indeed, *Katz* itself suggests the obligation to maintain the status quo is to protect the union, and suggests such protection may be waived by the union, 369 U.S. at 743-46; *see also Phelps Dodge Mining Co.*, 308 N.L.R.B. 985, 999 (1992) (relieving employer of duty to maintain status quo if union has "waived the right to bargain" about particular terms)—as the Union did here.

Likewise, the Teams rely on *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-96 (1957), and *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982). In those cases, the Court carefully examined the labor laws to determine whether, although those statutes were not intended to promote multiemployer bargaining (*Bonanno*, 454 U.S. at 409) and did not authorize lockouts by multiemployer groups, lockouts would sometimes not be considered an unfair labor practice. The Court's careful restriction of lockouts to certain situations did not involve a balancing of antitrust

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[4] The Teams' epiphany that "[t]here is 'no doubt whatsoever' that petitioners' antitrust claim would fail if asserted against a single employer", Opp. 17, is off-point: a single actor cannot conspire with itself. The suggestion that members of a sports league are a single economic actor immune from the Sherman Act because of the "necessity" of concerted action is rejected by every court of appeals, *see, e.g.*, *Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988) (collecting cases); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984), and the adoption of that theory would require the overruling of this Court's decision in *Radovich*; *see also Haywood v. NBA*, 401 U.S. 1204, 1205 (1971) (Douglas, J., in chambers).

policy with labor policy, because no antitrust claims were involved in those cases.

The overriding problem with the Teams' position is it assumes any tension, no matter how contrived, between the antitrust and labor laws requires the Sherman Act to yield. This Court's jurisprudence teaches exactly the opposite.[5]

II. NO CONFLICT BETWEEN THE LABOR AND ANTITRUST LAWS REQUIRES UNIONIZED EMPLOYEES TO BE STRIPPED OF THEIR SHERMAN ACT RIGHTS.

Because the Sherman Act applies to restraints on labor and the judge-made nonstatutory exemption to the Sherman Act must be tightly constrained, it is impossible to explain why employees should be stripped of their antitrust rights if they decide to unionize to avail themselves of their rights under the labor laws. The Teams must acknowledge that where no union exists, the antitrust laws forbid employers from colluding to fix wages. Nothing in the labor laws suggests they were designed to replace the antitrust laws. Of

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[5] The Teams also argue that by unionizing, employees necessarily give up the right to bargain over their own wages, and consequently have no individual interest in preventing collusively fixed wages. Opp. 20-21. That argument suffers from three major defects. First, that a bargain, if agreed-upon, is immune to antitrust attack by a member of the bargaining unit, does not mean that when no bargain exists, employers are free to collude to fix wages and terms of employment. Second, as this Court held in *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335-36 (1944), individual bargains and bargaining "are not forbidden, but indeed are necessitated by the collective bargaining process." The Court explicitly noted that individual bargains struck by employees in the absence of a collective bargaining agreement might be enforceable, at least so long as they did not reduce the employer's obligations. Third, as a factual matter, every agreement between the Union and the Teams has required individual bargaining for salaries and other terms of employment. Whatever the rule might be elsewhere, in this industry, each employee (and each Team) has a long history of and strong interest in individual bargaining of salaries.

course, bargaining itself must be immunized to permit bargains to be reached, and bona fide bargains themselves must be immunized: that is the purpose of the nonstatutory exemption as articulated by this Court.

Because this Court's nonstatutory exemption cases involve agreements (as the Teams' quotation from *Jewel Tea* confirms, Opp. 9), not unilateral conduct, the straightforward interpretation of the exemption is that it ends when the agreement ends. The Teams' objection rests on *Katz*'s statements about maintaining the status quo until impasse. However, if the exemption expires with the collective bargaining agreement, the incentives to reach a new bargain would not change, only the timing would. Indeed, the Teams' objection that the uncertainty of an "impasse" standard would be destabilizing—which is even truer of the standard the Circuit has adopted—is solved by terminating the nonstatutory exemption at contract expiration.

Even if the policy behind *Katz* were so important that it trumps the Sherman Act, at most that would justify extending the nonstatutory exemption up to the point of impasse, as advocated by the United States. The Teams' first objection is that some labor law duties—such as the duty to bargain in good faith, the duty to disclose relevant information, the duty not to withdraw from a multiemployer unit, and the duty not to withdraw recognition of the union—extend beyond impasse. However, none of those duties would be affected in any way by the antitrust laws' application to prevent employers colluding to fix wages and terms of employment.

The Teams' second objection is that an impasse standard would be "unworkable" because the determination of impasse is a "complex factual inquiry". Opp. 15. Of course, the NLRB routinely determines whether impasse has been reached. More importantly, if Congress intended to gut the Sherman Act whenever a complex factual inquiry was necessary, there would be no Sherman Act. Finally, if an impasse standard

may be too "complex", this leads to preferring a narrower nonstatutory exemption, not eviscerating the Sherman Act.

Perhaps the Teams' most disingenuous assertion is that unless unionized employees have no antitrust rights, multiemployer bargaining will effectively be outlawed. Opp. 17. If the nonstatutory exemption ends at contract expiration, impasse, or any other point short of union decertification, multiemployer groups will still be able to bargain as a group and reach agreements with labor as a group. What they will not be able to do, in the absence of an agreement, is fix wages and terms of employment collusively. Each Team, for example, would be free independently to adopt a salary cap, a wage scale, or any other employment term once the nonstatutory exemption expires, but several Teams could not collaborate to do so. There is no reason to believe multiemployer bargaining would be injured at all.

Indeed, the Circuit's rule is far more likely to injure multiemployer bargaining. Multiemployer bargaining is not required (or even mentioned) by the labor laws; it is permitted only with all parties' consent. *NLRB v. Typographical Union*, 632 F. 2d 171, 183 (2d Cir. 1980). If the price of multiemployer bargaining is loss of Sherman Act rights, employees will likely forego multiemployer bargaining or unionization altogether, thus making the balancing of labor concerns against antitrust interests entirely academic.

That conclusion is borne out in facts studiously ignored by the Teams. In response to the Eighth Circuit's *Powell* decision, the football players disbanded their union to bring an antitrust action. Years of litigation and labor unrest followed. In baseball, where no antitrust suit is possible, strikes and lockouts have become commonplace. Although eager to discuss public policy in theory, the Teams ignore the actual, proveable consequences resulting from the elimination of the Sherman Act rights of unionized employees. *See* Pet. 22-26. Indeed, following the Circuit's decision here, a

faction of the Union membership filed an antitrust lawsuit claiming they had sufficient votes to decertify the Union, a decertification election was held and decertification narrowly avoided, and litigation between the Union and the Teams is still pending both in the NLRB and in court.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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